FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Devi v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FedCFamC2G 522

File number(s):	SYG 959 of 2023
Judgment of:	**JUDGE STREET**
Date of judgment:	9 June 2023
Catchwords:	**MIGRATION** – interlocutory order – student visa – bogus document – applicants not passed immigration clearance at airport – injunction refused
Legislation:	*Migration Act 1958* (Cth); ss 5, 102, 116, 127A, 128, 129, 172.
Division:	Division 2 General Federal Law
Number of paragraphs:	14
Date of hearing:	9 June 2023
Place:	Sydney
Solicitor for Applicants:	Gill Lawyers
Solicitor for Respondent:	Australian Government Solicitor

ORDERS

SYG 959 of 2023

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**RITIKA DEVI** **First Applicant**
	ANIL KUMAR **Second Applicant**
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** **Respondent**

ORDER MADE BY: **JUDGE STREET**

DATE OF ORDER: **9 JUNE 2023**

THE COURT ORDERS THAT:

1. The application for an interlocutory injunction is refused.

2. The substantive application be stood over for further directions at 9:30am on 16 June 2023 by audio and video link pursuant to Part 6 Division 6 of the Act.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE STREET

1 This is an interlocutory application for an injunction. The Court was contacted by a Registrar at approximately 9:40pm on 9 June 2023 for an urgent application on behalf of two applicants to restrain their removal, not yet having cleared immigration detention.

2 The first applicant is said to be the holder of a student visa albeit the certificate of enrolment has not been provided. The second applicant appears to be the partner of the first applicant.

3 The application seeking the interlocutory injunction refers to a Subclass 500 Student visa and alleges a purported decision under s 172 of the *Migration Act 1958* (Cth) ('the Act'), read together with s 116, to cancel the visa is invalid.

4 The application identifies interlocutory relief being sought as well as identifying the background to the application, being that the first and second applicants arrived at Sydney Kingsford Smith Airport at 8:30pm on 8 June 2023 and had not entered Australia. There is a reference to the provision of a passport by the first applicant and some problem with the second applicant's identification. There is a reference to the issue of a Notice of Intention to Consider Cancellation, issued at 11:23pm on the 8 June 2023, and a reference to a delegate making a decision at 11:30pm. There is reference made to the delegate's reasons; identifying a reference to a refusal, inability to provide the clearance officer evidence of identity, evidence of visa passenger card, provided incorrect information on arrival.

5 There is then a reference to the purported grounds in relation to cancellation of the visa under s 116 and s 102 of the Act. There are then set out in paragraphs 13 to 17, the grounds either in support of allegation of procedural unfairness or asserting unreasonableness.

6 Mr Singh, solicitor for the applicants, contended that the applicants had funds available and that there must have been some error by the bank. Mr Singh contended that given time, the parties would be able to provide evidence to demonstrate the availability of funds and submitted that he had a sufficiently arguable case to warrant the grant of interlocutory relief.

7 The Court raised with Mr Singh the screenshot identified in account number from the second applicant. Mr Singh conceded that the second applicant provided information in support of the first applicant's student visa. The screenshot identifies a communication that the

documents in respect of the particular account in the name of the second applicant are fake. The screenshot was marked Exhibit A. A further screenshot identified the time of that communication, was marked Exhibit C. The timing of that communication, relevantly, was on 8 June 2023. Mr Singh maintained that there were funds available, that his clients had contacted the bank and would be able to demonstrate that they had funds.

8 Mr Sypott took the Court through provisions in relation to; s 128 of the Act, the grounds of cancellation under s 116 the Act, the absence of a procedural fairness requirement in terms of notice because of s 127A of the Act, the issue of notice under s 129 of the Act, given by hand to the applicants and the availability of procedure for revocation, whether or not an injunction were granted.

9 Mr Sypott submitted that there was no prima facie case and went through each of the paragraphs relied upon by the applicant to identify why they did not identify, on the arguable case, on relevant error, to justify the relief sought. Mr Sypott also submitted that the balance of convenience weighed against the grant of injunction in circumstances where the applicants could pursue the revocation process even if they were not permitted entry into Australia. Necessarily, this involved the applicants having to return to their home country. The balance of convenience is one that in the present case does not weigh heavily in favour of the applicants in circumstances where they can seek a revocation, external from Australia in respect to the cancellation and if successful, can seek to re-enter Australia.

10 The issue in respect to the bogus document is one that turns on whether there are reasonable grounds to believe for the Minister as defined in s 5 of the Act. The Court is not determining the matter at this stage, and all the following views are preliminary views, but the evidence identified in the screenshot identifies an evidentiary basis upon which it could be said that there are reasonable grounds to believe that the document in respect of the specified account in the name of the second applicant was a bogus document. The provision of the bogus document in support of the student visa was a matter in substance conceded as a fact by Mr Singh.

11 The more important issue is whether there is a prima facie case that the decision is invalid. This means whether if he evidence remains as it is there is a probability that at trial of the action the applicant will be entitled to relief. The first ground in substance relied upon by Mr Singh is the alleged denial of procedural fairness at the timing of the decision. Section 128

"the Minister, may without notice" 127A of the Act are, as Mr Sypott submitted, an exhaustive statement of the natural justice hearing rule an effective answer to that ground in terms of extinguishing the force of the timing giving rise to an arguable case in denial of procedural fairness.

12 In relation to the other grounds of illogicality, irrationality or unreasonableness, in the present case the information in the screenshot marked Exhibit A identifies an apparent logical and rational foundation for the making of an adverse decision in respect of there being reasonable grounds to believe that there is a bogus document that has been provided in support of the student visa, justifying the grounds of cancellation. The screenshot provides an apparent evidentiary intelligible justification for the exercise of the power of cancellation.

13 There is no apparent illogicality, there is no apparent irrationality and there is no apparent legal unreasonableness in process, decision-making or outcome at a prima facie level given the apparent bogus document provided in support of the visa by the first applicant. The applicants do not have a probability of success on the evidence currently before the Court if it remained the same at a final hearing. Taking into account the want of a prima facie case on this ground the Court would decline to grant an interlocutory injunction.

14 Further, taking into account the balance of convenience weighing against the grant of interlocutory injunction in the circumstances of this case is a further independent reason why the Court would decline in the present case to grant an interlocutory injunction.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Street.

Associate:

Dated: 9 June 2023